

BEFORE THE SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

RAY AND BARBARA KEALY	)	
	)	
Appellants,	)	SHB No. 90-78
	)	
v.	)	
	)	ORDER DENYING STAY
State of Washington DEPARTMENT	)	
OF ECOLOGY,	)	
	)	
Respondent.	)	

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On November 16, 1990 Ray and Barbara Kealy filed an appeal contesting the Department of Ecology's (DOE) issuance of Second Amended Order and Notice of Penalty Incurred, Docket Nos. 88-139 and 88-259. On November 28, 1990 appellants filed a motion for emergency stay or in the alternative dismissal. The parties agreed to hold the stay hearing on November 30, 1990, to be decided by the Presiding Board Member alone. On November 29, 1990, appellants filed an affidavit in support and DOE filed a memorandum, affidavit and documents in opposition.

An emergency stay hearing was held November 30, 1990. Present for the Shoreline Hearings Board was Chair Judith Bendor, presiding. Appellants Kealy were represented by Attorney Stephen T. Whitehouse (Shelton). DOE was represented by Assistant Attorney General Allen T. Miller. Court Reporter Jean M. Ericksen (Robert H. Lewis & Assocs., Tacoma) took the proceedings.

ORDER DENYING STAY  
SHB No. 90-78

(1)

1 With the parties' agreement witnesses were called and gave sworn  
2 testimony. Exhibits were admitted and reviewed. Argument was made.  
3 From the foregoing, the Board made an oral ruling denying stay. The  
4 Board, however, ruled that the DOE Order was stayed pending a ruling  
5 by the entire Board on a legal issue of statutory construction. This  
6 opinion confirms that oral ruling:

7 FINDINGS OF FACT

8 I

9 Ray and Barbara Kealy live at West 2780 Skokomish Valley Road, in  
10 the Skokomish Valley, in Mason County, Washington. They bought the  
11 property in 1979.

12 The contested DOE order alleges that the Kealys violated the  
13 Shoreline Management Act, Chapt. 90.58 RCW, by constructing a dike in  
14 the shoreline between 1982 and 1986 without first obtaining a  
15 shoreline substantial development permit, and also in contravention of  
16 RCW 90.58.020 on permitted uses. The order assesses a \$30,000 penalty  
17 and requires the dike be removed by November 30, 1990. The order  
18 waives the penalty if the dike is removed by that date.

19 II

20 Ray Kealy was a party, along with others, in a previous action  
21 before this Board, SHB Nos. 88-25, 88-31 & 88-36 regarding the dikes.  
22 Seven days of hearing were held. A decision was issued on June 28,  
23 1990 containing Findings of Fact, Conclusions of Law and an Order.  
24 Judicial notice is taken of that decision.

25  
26 ORDER DENYING STAY  
SHB No. 90-78

III

In SHB No. 88-25 the Board found that the Skokomish Valley was subject to frequent flooding, typically overflowing once or more a year during the winter rainy season. (Finding of Fact 6) The 6500 feet of dike, including the Kealy portion, were not constructed in a manner that complied with any identified standards for proper dike construction. (Finding 40) The structure was inadequately compacted and contained some woody debris (Finding 40). The portion constructed by Ray Kealy was largely constructed with tires. (Transcript of Day VII, at page 81 lines 3 & 4, and page 84 lines 1-4.) The Board found that the dike would likely fail in the event of a major flood (100-year or greater). (Finding 41)

The Board concluded that the dike was built in violation of the Shoreline Management Act. It affirmed all civil penalties except that issued to Ray Kealy, having found that he did his work before 1987. (Finding 37) Since the DOE abatement order to Kealy referred to diking done in 1987, the Board concluded the DOE order did not require him to do anything, having recited the wrong year. The Board vacated the civil penalty assessed against him.

The Board suspended the penalties against the others until October 31, 1990 to provide time for dike abatement to occur. Those parties have appealed the Board's decision to Superior Court.

Subsequently DOE issued the Second Amended Order to Ray and

1 Barbara Kealy, which is the subject of this appeal and emergency stay  
2 proceeding.

3  
4 III

5 As the previous decision found:

6 *Mean annual precipitation onto the Skokomish*  
7 *basin ranges from 200 to 220 inches per year*  
8 *in the upper watershed to 80 to 90 inches per*  
9 *year in the Skokomish Valley. Average*  
10 *precipitation, basin-wide, is about 133*  
11 *inches per year. More than three-fourths of*  
12 *the yearly precipitation, mostly rainfall,*  
13 *occurs from October through March. Finding 2.*

14 During the 1990 Thanksgiving holiday period there were record  
15 floods in Washington. Flooding occurred in the Skokomish Valley.  
16 Rainfall recorded at Lake Cushman dam some miles above the Valley  
17 showed 4.5 inches of rain fell from Wednesday November 21, 1990 through  
18 Friday November 23, 1990. The dam released water some time early  
19 Saturday morning, during the night. On Saturday November 24, 1990 6.87  
20 inches of rain fell.

21 At the Kealy property water began to come over the top of the dike  
22 at about 10:15 pm Friday night. That night a 45 to 47 foot section of  
23 the Kealy dike broke. The Skokomish River flooded out through the  
24 breach, depositing debris in the Valley, including tires from the Kealy  
25 dike. The tires were found on nearby neighbors' property, including  
26 that of Stephen J. Wilmus and Skokomish Farms.

27 IV

Any Conclusion of Law deemed to be a Finding of Fact is hereby  
adopted as such.

ORDER DENYING STAY  
SHB No. 90-78

(4)

1 From these Findings of Fact, the Board reaches the following:

2 CONCLUSIONS OF LAW

3 I

4 The Shoreline Hearings Board has jurisdiction over these issues and  
5 these parties. Chapt. 90.58 and 43.21B RCW.

6 II

7 After appeal to this Board, the collection of any shoreline penalty  
8 is automatically stayed pending a final decision. WAC 173-17-060.

9 There is no separate provision for stays of shoreline enforcement  
10 orders, so RCW 43.21B.320(3) is used by analogy. That section,  
11 relating to appeals to the Pollution Control Hearings Board, states:

12 The applicant may make a prima facie case for  
13 stay if the applicant demonstrates either a  
14 likelihood of success on the merits of the appeal  
15 or irreparable harm. Upon such a showing the  
16 hearings board shall grant the stay unless the  
17 department or authority demonstrates either a)  
18 a substantial probability of success on the merits,  
19 or b) likelihood of success on the merits and an  
20 overriding public interest which justifies denial  
21 of the stay.

22 It is concluded that the Department of Ecology has demonstrated a  
23 substantial probability of success on the merits, i.e. that Mr. Kealy  
24 constructed a dike without a permit in violation of the Shoreline  
25 Management Act, Chapt. 90.58 RCW. Therefore the stay should be  
26 denied. RCW 43.21B.320(3).

27 In addition, this is not a safe dike. The dike consists primarily

1 of tires backfilled with dirt. Its construction does not comply with  
2 known, acceptable standards. It was predicted that the dike would fail  
3 and it did so. As a result, during the Thanksgiving holiday the  
4 Skokomish River flowed through the 45-47 foot breach, sending flood  
5 waters, debris and tires into the Valley.

6 It is concluded that the Department has demonstrated a second basis  
7 for denying the stay, an overriding public interest.

8 III

9 Any Finding of Fact deemed to be a Conclusion of Law is hereby  
10 adopted as such.


11 From these Conclusions of Law, the Board enters this:

12 ORDER

13 The Board's November 30, 1990 oral ruling DENYING Appellant's  
14 Motion for Stay is CONFIRMED. Appellants will have 30 days from the  
15 date the Board issues a decision on the legal issue of statutory  
16 construction to comply with DOE Order DE Nos. 88-139 and 88-259.

17 DONE this 13<sup>th</sup> day of December, 1990.

18  
19 SHORELINE HEARINGS BOARD

20   
21 JUDITH A. BENDOR, Chair and Presiding

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2 BEFORE THE SHORELINES HEARINGS BOARD  
3 STATE OF WASHINGTON

4 RAY AND BARBARA KEALY )

5 Appellants, )

6 v. )

7 State of Washington DEPARTMENT  
8 OF ECOLOGY, )

9 Respondent. )

SHB No. 90-78

ORDER DENYING STAY  
(SECOND)

10 On December 13, 1990 the Shoreline Hearings Board issued an Order  
11 Denying Stay in this matter on factual grounds, but deferred ruling on  
12 the statutory construction issue.

13 On December 18, 1990 the Shorelines Hearings Board heard oral  
14 argument by telephone on appellants' statutory construction issue.  
15 Present for the Board were Members: Judith Bendor, chair and  
16 presiding, Harold Zimmerman, Richard Gidley and William Derry. Member  
17 Nancy Burnett has reviewed the record. Appellants Kealy were  
18 represented by Attorney Stephen Whitehouse. Respondent DOE was  
19 represented by Assistant Attorney General Allen T. Miller. A court  
20 reporter took the argument.

21 In reviewing the record, the Board did not consider the  
22 attachments appended to respondent Department of Ecology's  
23 December 14, 1990 memorandum.

24 Appellants assert that the statute Chapt. 90.58 RCW and its  
25 implementing regulations at Chapt. 173-17 WAC are to be construed so

26 ORDER DENYING STAY  
27 SHB No. 98-78

(1)

1 as to require that the issuance of a penalty be stayed pending a  
2 hearing on the merits. Appellants assert that this is necessary to  
3 assure procedural due process.

4 Statutes which are clear on their face are not subject to  
5 construction. RCW 90.58.210 is clear that DOE has the authority to  
6 issue civil penalties and that appeals are to this Board. It is the  
7 execution of the penalty which is stayed pending a hearing, i.e. no  
8 penalty can be collected. The statute does not provide for a stay of  
9 the penalty's issuance. Such a statutory approach has been found to  
10 afford due process. See, Yakima Clean Air Authority v. Glascam  
11 Builders, 85 Wn.2d 255, 534 P.2d 33 (1975).



ORDER

Appellants Motion for Stay is DENIED. Appellants have 30 days from the issuance of this Order to avail themselves of the waiver provision in DOE Order DE Nos. 88-139 and 88-259.

DONE this 3<sup>rd</sup> day of January 1991 ~~December, 1990.~~

SHORELINE HEARINGS BOARD

Judith A. Bendor  
JUDITH A. BENDOR, Chair and Presiding

Harold S. Zimmerman  
HAROLD S. ZIMMERMAN, Member

Nancy Burnett  
NANCY BURNETT, Member

Richard Gidley  
RICHARD GIDLEY, Member

William E. Derry  
WILLIAM E. DERRY, Member